Supreme Court, U. S.
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IN THE SUPREME COURT OF THE

UNITED STATES

Summer Term, 1976

76-72

JERRY MICHAEL SOLIMINE

Petitioner

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari
to the United States Court
of Appeals
for the Sixth Circuit

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Petition

The petitioner, Jerry Michael Solimine, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on June 18, 1976.

Opinions Below

Sixth Circuit. The opinion of the Court below in this case (Appendix A, infra, p. 1) has not yet been reported.

District Court

There was no formal opinion of the District Court. Excerpts of the transcript in that Court, including the Order in the District Court are reproduced in Appendix B to this Petition.

Jurisdiction

The judgment of the Court of Appeals (p. 15 infra) was entered or June 18, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

(1) Whether unclarified and confusing testimony concerning a negotiated plea, when the problem could easily have been corrected by the prosecution, denied the Appellant his right to a fair trial.

(2) Whether a search of closed cartons temporarily stored in a warehouse, when permission was given by the manager of the warehouse, violated the Appellant's Fourth Amendment right to be protected against unreasonable searches and seizures.

(3) Whether the Appellant's conviction for both theft and receiving stolen property may stand when the conviction of co-defendant Sclafani was reversed on these grounds.

Constitutional and Statutory Provisions Involved

Amendment IV: The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case

Appellant was indicted on three counts of (1) Conspiracy in violation of Title 18 §371 U.S. Code; (2) Theft from Interstate Shipments in violation of Title 18 §659 and §2, U.S. Code; and (3) Receipt and Possession of Goods Stolen from Interstate Shipment in violation of Title 18 §659 and §2 U.S. Code. The indictment charged that the Appellant conspired with four co-defendants to steal 641 cartons of Levi Strauss clothing products from interstate shipment.

The clothing cartons were viewed in the warehouse by an FBI agent who was present at the request of Mr. Saylor, manager of the storage facility. A motion to suppress made by the defendant Sclafani (R. 28) was denied, based on the consent to the search given by Mr. Saylor.

The trial of appellant was held in the United States District Court for the Southern District of Ohio.

A key witness for the government was William Skirvin, named as a co-conspirator but not a defendant. Mr. Skirvin had driven the clothing cartons from lawful storage to the warehouse where they were stored after the theft. As a result of a plea bargain, the charges against Mr. Skirvin were reduced to a misdemeanor. (R. 12) Mr. Skirvin was never certain as to the true nature of the plea bargain. (R. 16) A motion to dismiss made by the appellant as a result of this testimony was denied. (R. 30)

The appellant was found guilty on all three counts of the indictment, as was the co-defendant Sclafani. They each received sentences of five years for conspiracy, ten years for theft, and ten years for receipt and possession of stolen goods. All sentences were to be served concurrently.

Appellant's conviction was affirmed on June 18, 1976, by the Court of Appeals for the Sixth Circuit. Sclafani's conviction was reversed and remanded by the Court of Appeals on the ground that Sclafani could not be convicted of both theft and of receiving stolen goods when he had participated in the theft. This, in part, is a basis for appellant's Petition for Certiorari.

Reasons for Granting the Writ

(1) The failure of the government to clarify the exact nature of the plea bargain reached in this case denied the appellant his right to a fair trial. Mr. Skirvin had accepted a plea bargain

in exchange for a reduction of the charge from a felony to a misdemeanor theft charge. Although there were criminal charges pending against him, Mr. Skirvin testified he was not aware of any criminal charges pending against him. (R. 202)

The prosecutor should have corrected this trial testimony and the confusing impression it created at trial. The U.S. Attorney was in the best position to know the exact nature of the plea bargain yet he did not correct the testimony of Mr. Skirvin. U.S. v. Ott, 489 F.2d 872 (1973); Napue v. Illinois, 360 U.S. 264 (1959).

The record reflects several subtle techniques used by the prosecution to obtain Mr. Skirvin's continued cooperation. A conviction had been obtained on a misdemeanor, but a substantive charge on a felony was still, at least in Mr. Skirvin's mind, hanging over his head.

The Government may not allow false evidence to go uncorrected when it appears.

(2) The evidence introduced at trial of the 641 cartons of clothing should have been suppressed based on the illegal nature of the search and seizure.

The manager of the warehouse was in no position to consent to the search of the stolen cartons. Chapman v. U.S., 365 U.S. 610; Stoner v. California, 376 U.S. 483. Valid consent depends on some mutual use of the property, which is nonexistent in this case.

Neither was the warrantless search justified by any exigent circumstances. The premise of this argument is that the consent given by the manager of the warehouse was ineffective to authorize the subsequent search. Since no effective consent was present, any search required a search warrant.

(3) The appellant was convicted of both a theft and possession of the goods stolen in a theft. On the authority of the Court of Appeals decision in this case as to defendant Sclafani, the

appellant's conviction should be reversed.

In Prince v. United States, 352 U.S. 322 (1957), the Supreme Court held that a bank robber cannot be convicted of both robbery and entry of a bank with intent to commit robbery. Applying the principles of Prince to defendant Sclafani's appeal, the Court of Appeals vacated Sclafani's conviction as to the possession of stolen goods.

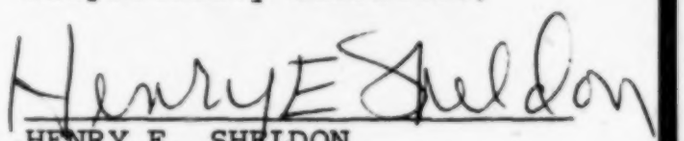
The same reasoning is applicable to the appellant's conviction for both theft and receipt and possession of stolen goods. U.S. v. Gaddis, 44 U.S.L.W. 4293 (1976).

The appellant and defendant Sclafani were charged in identical counts, at least insofar as the theft and possession of stolen goods was concerned. To uphold the conviction of the appellant on both theft and possession of stolen goods, when a co-defendant has been partially exonerated, would result in a miscarriage of justice.

Conclusion

The appellant respectfully petitions this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in order to review the issues raised in this petition.

Respectfully submitted,



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APPENDIX

A.1 Constitutional Provisions Involved

Amendment IV: The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

A.2 Opinions Below

(DISTRICT COURT CAPTION)

UNITED STATES OF AMERICA	:	
	:	
vs.	:	No. CR-1-74-38
	:	
JERRY MICHAEL SOLIMINE	:	ORDER

The defendant Solimine has filed a petition for reduction of sentence.

Insofar as the petition seeks a suspension of the execution of sentence and placement on probation at this time, it is denied.

Insofar as the petition seeks a reduction of the sentence of ten years to a lesser term, the petition will be permitted to pend without ruling for disposition at a later time.

/s/ Timothy Hogan
HONORABLE TIMOTHY HOGAN
United States District
Judge

(DISTRICT COURT CAPTION)

UNITED STATES OF AMERICA	:	
	:	
vs.	:	No. CR-1-74-38
	:	
JERRY MICHAEL SOLIMINE, et al.	:	ORDER

After verdict in this case, this date, the Court remanded two of the five defendants convicted by the jury verdict in this case to the custody of the United States Marshal pending sentencing. The present bail in respect of three of the convicted defendants was continued pending sentence. Thereafter, counsel for the two defendants remanded to custody pending sentencing, to wit, Jerry Solimine and Samual Sclafani, moved on behalf of their clients, in chambers and orally, that their clients, to wit, Solimine and Sclafani, be admitted to some bail pending sentencing. That oral motion is denied for these reasons:

(1) The proof of guilt of the two defendants involved to a major interstate theft is overwhelming.

(2) During trial there was testimony from one witness that Solimine and Sclafani, along with one other leader in the conspiracy, which other leader has vanished, expressed to a relatively minor member of the conspiracy, during the time when the heat was on, that if he did not continue to go along with them he might find the head of one of his children on the back sear of his car.

(3) One witness called by the Government during this trial was pretty obviously under some fear and stress in excess of that observed in even excitable witnesses under ordinary circumstances.

This Court also feels from the evidence - above and additional - at the trial that this Court is not in a position to fix a realistic bond at this time lacking some further information. It is emphasized that information will be undoubtedly available before sentencing and it is expected that a realistic bail bond on appeal will be fixed for the two defendants involved at

that time. In other words, this Court is not denying bail pending appeal.

/s/ Timothy Hogan
HONORABLE TIMOTHY HOGAN
United States District
Judge

Nos. 75-1867, 75-2134, 75-2369
(Consolidated)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

JERRY MICHAEL SOLIMINE,
Appellant in No. 75-1867,

SAMUEL A. SCLAFANI,
Appellant in No. 75-2134,

JULIO JOSEPH PISCOPO,
Appellant in No. 75-2369.

APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed June 18, 1976.

Before: PHILLIPS, WEICK and ADAMS,* Circuit Judges.

ADAMS, Circuit Judge. These appeals follow convictions in connection with the hijacking of a truckload of clothing. A variety of contentions are advanced by the defendants; the most significant concerns the question whether one may be convicted of both a theft and the possession of the goods stolen in the theft.

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* The Honorable Arlin M. Adams, Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

I.

The actual hijacking was done on August 8, 1973 by William Skirvin, a driver for Roadway Express. Disguised with a false beard, Skirvin stole a tractor-trailer containing Levi Strauss products from the terminal of his employer in Cincinnati, Ohio. Skirvin took the rig in collaboration with and under the influence of Jerry Solimine, a used car dealer to whom he was in debt. He also cooperated with Samuel Sclafani, who was to arrange for the "fencing" of the goods in Detroit, and Irving Sisson, an associate of Sclafani and Solimine.

Skirvin drove the tractor trailer to the Young Movers Warehouse in Cincinnati where Solimine and a friend, Richard Burress, had made storage arrangements. There Skirvin, Sclafani, Sisson, Burress, and Solimine unloaded 641 cartons from a truck. Melvin Sims, an employee at Solimine's used car lot, and Terry Saylor, the Manager of the warehouse, assisted them.

The following day, August 9, Saylor heard a radio newscast about the hijacking of a Roadway Express truck. He called his brother, the owner of the warehouse, who put Saylor in touch with the FBI. On August 11, FBI agent William Weatherwax came to the warehouse and inspected the cartons, which were stored in an open area. At that time, only 596 cartons remained in the warehouse, since on the previous day Sclafani, with Sisson and Julio Piscopo, had loaded 45 of the cartons into a camper vehicle and driven them away.

FBI agents placed the warehouse under surveillance. Sclafani, Sims, and Robert Boulier were arrested on August 17 when they came to the warehouse with a rented truck and began to load it with the stolen merchandise.

Skirvin was subsequently arrested, but his cooperation with the government resulted in an arrangement that permitted him to plead guilty to a misdemeanor offense. Solimine, Sclafani, Sisson, Burress, Sims, Boulier, and Piscopo were subsequently indicted for various counts of conspiracy, theft, and

receipt and possession of goods stolen from an interstate shipment. The trial of all but Sisson, who appears to have eluded arrest, was held from March 3 to March 7, 1975. The jury convicted all of the defendants except Sims, whose motion for acquittal had been granted by the court. Three of the defendants – Sclafani, Solimine and Piscopo – now bring appeals.

Sclafani and Solimine were found guilty of conspiracy, theft from interstate shipment, and receipt and possession of goods stolen from interstate shipment. They each received sentences of five years for conspiracy, ten years for theft, and ten years for receipt and possession of stolen goods. All sentences were to be served concurrently.

Piscopo, who was found not guilty with respect to the conspiracy charge, was convicted of receipt and possession of stolen goods. He was given a one-year sentence, which was suspended, and placed on probation for two years.

II.

Only one contention is raised by Piscopo: that there was insufficient evidence to prove his guilt of receipt and possession of stolen property in violation of 18 U.S.C. § 659.

All of the evidence against Piscopo was provided by the direct examination of Terry Saylor, the manager of the warehouse. Saylor testified that on August 10, 1975, two days after the hijacking, Piscopo assisted Sclafani and Sisson in loading about 45 cartons of stolen goods into a camper vehicle that bore Michigan license plates. He also stated that Piscopo was present when Sclafani asked him whether campers and rented trucks, such as the one that was to be employed on August 17, had to stop at weigh-stations. In Ohio weigh-stations are operated by the state police. Finally, Saylor described how Piscopo drove off in the camper with Sisson.

Piscopo claims that the government demonstrated only that he was at the scene, but failed to prove either possession or guilty knowledge on his part. We cannot agree.

The evidence against Piscopo is indicative of far more than mere presence when stolen goods were possessed by another. It shows active participation in loading and carrying away stolen property. This participation might seem even more incriminating to the jury when, in the context of a scheme to fence the stolen goods in Michigan, it is recalled that the goods were transported from the Ohio warehouse in a vehicle with a Michigan license.

In *United States* v. *Nally*,[1] the convictions rested on the presence of the defendants under suspicious circumstances at the site where a hijacked truck was hidden. Here, Piscopo not only approached the stolen goods, but also helped to load them into a vehicle and then drove off in that vehicle accompanied by one of the prime movers of the criminal scheme. Piscopo's possession was, consequently, more than "passing control."

Under such suspicious circumstances as appear here, it is permissible for the jury to infer from the possession of stolen goods the knowledge that the goods were stolen.[2] Not long ago the Supreme Court upheld a presumption of guilt on the basis of the "unexplained possession of recently stolen property."[3] In this respect, the evidence against Piscopo is much like that in *United States* v. *Spatuzza*,[4] where the Seventh Circuit upheld a conviction for receipt and possession of stolen goods largely on the basis of participation in the loading of such goods into the van that carried them away.

Accordingly, the conviction of Piscopo will be affirmed.

III.

Except in one instance, the arguments advanced by Sclafani and Solimine may each be disposed of without extended discussion.

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1 455 F.2d 259 (6th Cir. 1972).
2 *United States* v. *Prujansky*, 415 F.2d 1045, 1050 (6th Cir. 1969).
3 *Barnes* v. *United States*, 412 U.S. 837, 841-46 (1973).
4 331 F.2d 214, 216 (7th Cir. 1964), *cert. denied*, 379 U.S. 829 (1964).

A. Pretrial Delay.

Sclafani argues that the lapse of eleven months between his arrest and the return of the indictment, in combination with the seven and one-half months that intervened between the return of the indictment and the trial, was inherently prejudicial and constituted grounds for dismissal of the indictment.

This claim cannot survive the test of *Barker* v. *Wingo*.[5] There the Supreme Court held that delay in itself was not a sufficient ground for finding a violation of the right to a speedy trial.[6] Significant delay, however, does serve to trigger an *ad hoc* balancing of the relevant factors.

In the present case there is no indication that the time lag was for an improper purpose. Nor did Sc'afani assert his right to a speedy trial prior to this appeal. In fact, Sclafani actually sought a continuance when the case was scheduled for trial. Further, Sclafani has utterly failed to meet his burden with respect to the most critical element of the analysis — the showing of prejudice.[7]

B. Access to the Grand Jury Minutes.

Access to the transcript of the proceedings before the grand jury was sought by Sclafani in order to discover impeachment material that might be used against the government's witnesses. The trial court denied Sclafani's motion for production of this material. Indeed, the court could not satisfy Sclafani since the interrogation that had been preserved was that of codefendant Solimine, who invoked the fifth amendment to avoid giving testimony that might incriminate him.

[5] 407 U.S. 514 (1972).

[6] *Id.* at 533.

[7] *Trigg* v. *State of Tennessee*, 507 F.2d 949 (6th Cir. 1974), *cert. denied*, 420 U.S. 938 (1975).

The transcript containing the questions put to Solimine was, in fact, delivered to counsel for Sclafani.

The Court could not grant access to non-existent records, and it is not required that testimony before the grand jury be recorded.[8] Thus, no legally cognizable harm could flow to Sclafani from the failure to produce the non-existent grand jury minutes. We repeat, however, the prior observation by this Court that it would be better practice to make and preserve a record of grand jury testimony.[9]

Sclafani's collateral claim that his indictment was faulty because it was based on hearsay testimony related to the grand jury by agent Bruce Stepp, rather than on direct testimony from witnesses that the government ultimately employed at trial, is not supported by authority. The Supreme Court has held that indictments may be founded on hearsay.[10] In addition, we note that Stepp supervised and participated in the surveillance at the warehouse and in the arrests of August 17, and much of his testimony consisted of first-hand information rather than hearsay.

C. Warrantless Search.

Solimine and Sclafani both charge that their fourth amendment right to be secure against unreasonable searches was violated by the FBI's inspection of the warehouse where the stolen goods were stored. They contend that the FBI's examination of the cartons, which was done without a warrant, was not justified by exigent circumstances. In addition, the stolen

[8] *United States* v. *Battisti*, 486 F.2d 961, 963 (6th Cir. 1973); *United States* v. *Allen*, —— F.2d —— (6th Cir. 1975) (No. 74-1959), *cert. denied*, 44 U.S.L.W. 3412 (1976) (No. 75-643).

[9] 486 F.2d at 963. We note that the Court of Appeals for the Third Circuit requires that the testimony of all witnesses before a grand jury be recorded, if the testimony of any witness is to be recorded. This rule is intended to give the government and the defendant an equal opportunity to impeach unfavorable witnesses. *See United States* v. *Crutchley*, 502 F.2d 1195, 1200 (1974).

[10] *Costello* v. *United States*, 350 U.S. 359 (1956).

cartons were not in "plain view" within the warehouse, according to these defendants, because they were alone on a separate floor.

We find no merit in these contentions. At the behest of Saylor, special agent Weatherwax visited the Young Movers warehouse on August 11. Saylor took Weatherwax to the floor where the cartons from the Roadway Express trailer were stored. The cartons were not shut-off by partitions and locked doors, the floor itself was not sealed, and Saylor's access was not at all limited. Weatherwax examined the cartons but did not open any of them.

It is apparent that the inspection by Weatherwax was conducted with the consent of a person who had complete custody and authority over the premises. In fact, the search was at the unsolicited invitation of Saylor. Such a search is not prohibited by the fourth amendment and does not require a warrant.[11] A party who permits his goods to remain in an open area of a warehouse, accessible to the operator of the warehouse and any person admitted by the operator, cannot be said to have an expectation of privacy with respect to those goods. Such party must assume the risk that his warehouseman may consent to a search of the premises, and that the goods may thereby be subjected to exposure.[12]

D. Evidence of the Value of the Stolen Articles.

Proof that the stolen merchandise was worth more than $100, the amount necessary to constitute a felony under section 659, is also challenged by Sclafani. His contention is that the prosecution failed to submit *expert* testimony regarding the fair market value of the stolen products. The argu-

[11] *United States* v. *Matlock*, 415 U.S. 164, 169-72 (1974).

[12] *United States* v. *Novello*, 519 F.2d 1078 (5th Cir. 1975); *United States* v. *Piet*, 498 F.2d 178 (7th Cir. 1974), *cert. denied*, 419 U.S. 1069 (1974).

ment thus rests on a fundamental misconception of the necessary proof. Although the evidence must be competent, the government's proof of value need not be based on an appraisal by an expert.

Here, the traffic manager of Levi Strauss testified about the size of the shipment and the total invoice price, which was $95,881.77. He also testified about the invoice price of 14 individual cartons of clothing, all of which were admitted into evidence, together with the appropriate bills of lading and invoices. No carton had contents worth less than $100. If the invoice price, which was amply proven, was more than $95,000, the jurors could have rationally concluded that the retail price would be even greater.[13]

In addition, there was testimony that the conspirators expected to obtain about $90,000 for the stolen goods on the thieves' market. Such circumstantial evidence is admissible to prove the value of stolen goods.[14]

Thus, there was ample evidence from which the jury could infer, without resort to speculation, that the value of the stolen articles was greater than $100.

E. Prejudicial Testimony.

On direct examination in his own behalf, codefendant Burress testified that he had been coerced by threats made against his family by the absent codefendant, Sisson. No explanation of this testimony was sought by any of the defendants on cross-examination. Nor was there any objection or subse-

[13] Although 18 U.S.C. § 659 does not establish a standard for determining the requisite value of the stolen property, some courts have adopted the standard of § 642: "face, par, or market value, or cost price, either wholesale or retail, whichever is greater." *See United States* v. *Payne*, 467 F.2d 828, 830 n. 5 (5th Cir. 1972), *cert. denied*, 410 U.S. 912 (1973); *Torres* v. *United States*, 270 F.2d 252, 256 (9th Cir. 1959), *cert. denied*, 362 U.S. 921 (1960). Under whatever standard might be employed, including fair market value, the government has met its burden here.

[14] *United States* v. *Tyler*, 474 F.2d 1079, 1080 (5th Cir. 1965).

quent request for instructions to the jury to mitigate the prejudicial impact of this arguably irrelevant testimony.

In the absence of an objection or a request for instruction by the defendants, we find no error in the admission of this testimony.[15]

Sclafani urges, however, that the testimony was not only irrelevant and prejudicial, but that it was also false. This assertion was raised in a post-trial motion for acquittal, accompanied by an affidavit by an attorney for one of the defendants. The affidavit stated that the attorney had overheard a comment by Burress on the day the testimony was given that suggested that his testimony had been fabricated.

The question raised is one that would appear more appropriate to a motion for a new trial under Rule 33, than to a motion for acquittal under Rule 29, since it involves an element of unfairness introduced into the trial by a codefendant rather than the sufficiency of the government's case. Indeed, in his brief Sclafani himself refers to the motion as a "motion to vacate" the judgment.

However, even reading the affidavit in the light most favorable to the defendants, and assuming that Burress' testimony was false, there is no basis for granting a new trial. Evidence that discredits a witness, but does not directly contradict the government's case, is not a ground for granting a new trial.[16] To destroy confidence in Burress' testimony would not undercut in any way the government's evidence in this prosecution.

F. Skirvin's Plea Bargain.

Skirvin, the Roadway Express driver, was a key witness for the government. Sclafani and Solimine sought dismissal because, they claim, the nature of Skirvin's plea bargain was

[15] *See Fallen* v. *United States*, 343 F.2d 844, 846 (5th Cir. 1965).

[16] *United States* v. *Sposato*, 446 F.2d 779, 781-82 (2d Cir. 1971); *United States* v. *Rodriguez*, 437 F.2d 940 (5th Cir. 1971).

not completely revealed to the jury. In particular, they charge that the jurors were not adequately informed regarding Skirvin's sentencing and about the original felony charge that remained outstanding against him.

Had the jurors been misled about the nature of the plea bargain they might, arguably, have been unable to determine the veracity of the witness, thereby prejudicing the defendants.[17] In this case, however, the jurors were accurately informed that Skirvin had not yet been sentenced and that the government had made no promises to him with respect to sentencing. In addition, the district court ruled that as a matter of law Skirvin's plea to the misdemeanor charge had terminated the felony charge in question. Thus, the jurors were correctly advised and in a position to weigh the credibility of Skirvin's testimony.[18]

IV.

Finally, Sclafani contends that he was improperly convicted of both theft from an interstate shipment and possession of goods stolen from an interstate shipment, since the goods at issue in the possession count are the same goods that were the subject of the theft count. Because the instructions to the jury were inaccurate in this respect, Sclafani argues, his convictions on these counts, and the associated conspiracy count, must be reversed.

We agree that, on the basis of the facts in this case, Sclafani cannot be convicted of both the theft and possession of the same goods. However, this conclusion does not require the reversal of *all* of Sclafani's convictions.

[17] *See, e.g., Giglio* v. *United States*, 405 U.S. 150 (1972).

[18] *United States* v. *Fontenot*, 483 F.2d 315, 325-26 (5th Cir. 1973); *United States* ex rel. *Romeo* v. *McMann*, 418 F.2d 860 (2d Cir. 1969), *cert. denied*, 398 U.S. 913 (1970).

A. The Consequences of Prince and Milanovich.

The Supreme Court in *Prince* v. *United States*[19] held that a bank robber cannot be convicted of both robbery and entry of a bank with intent to comit a robbery, if the robbery is consummated. The unlawful entry is to be considered a lesser included offense that merges into the completed crime. Entry itself, the Court stated, was made illegal in 18 U.S.C. § 2113 in order to reach culprits who fall short of their purpose, not to fragment the crime for the sake of punishment.

In *Heflin* v. *United States*[20] the Court also applied a functional analysis of the statutory purpose. Convictions for separate counts of bank robbery and receipt and possession of stolen funds were reversed in *Heflin* since the robbers were accused of receipt and possession of the very funds which they had taken in the robbery. As the Court recently reiterated in *United States* v. *Gaddis*,[21] the purpose of the possession subsection, like that of the illegal entry provision, is to reach a "different 'group of wrongdoers,' i.e., 'those who receive loot from the robber.'" It is not the intent of Congress to "pyramid" the punishment of the bank robbers themselves by the multiplication of their offenses.[22]

Similarly, in *Milanovich* v. *United States*,[23] the provisions of 18 U.S.C. § 641, which pertain to stealing government property, have been held not to support convictions for both theft and receiving and concealing the same property. Indeed, the decision in *Milanovich* may be regarded as a generous application of the principles of *Prince* and *Heflin*, since there had been a substantial hiatus between Mrs. Milanovich's participation in the theft, which was completed after she

19 352 U.S. 322 (1957).

20 358 U.S. 415 (1959).

21 44 U.S.L.W. 4293 (1976) (No. 74-1141).

22 *See Heflin*, 358 U.S. at 420.

23 365 U.S. 551 (1961).

abandoned her accomplices, and her receipt of the stolen money.

According to the Supreme Court, *Prince*, *Heflin*, and *Milanovich* were predicated on statutory construction, not common law distinctions.[24] Consequently, the government urges that the reasoning of those cases, which dealt with sections 2113 and 641, cannot be employed with respect to convictions under section 659. The original enactments of both section 2113 and section 641 were subsequently amended to encompass the entry or possession offenses. The Court in each case referred to the absence of legislative history to indicate that the amendments were passed in order to subdivide the crimes and increase the penalties. The theft and possession provisions of section 659, however, were enacted simultaneously. Therefore, the government asserts, the reasoning which forbids multiple indictments in the case of bank robbery or theft of government property cannot apply to theft from interstate shipment. The government's argument is not convincing.

The functional approach to statutory interpretation which the Supreme Court has applied with respect to sections 2113 and 641, applies equally to section 659. There is no indication in the sparse legislative history of section 659 that Congress intended to regard each theft from interstate shipment as a multiplicity of discrete offenses so that the punishment for such theft could be enhanced. On the contrary, section 659 demonstrates Congress' capacity to create multiple offenses, subject to multiple penalties, when it thinks such measures necessary. In Section 659, Congress has explicitly commanded that "[t]he carrying or transporting of such . . . goods, . . . in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking . . . ."

24 *Id.* at 554.

Without evidence of an intent to effect a similar accumulation of penalties with respect to possession of stolen goods, the line of cases concluding with *Gaddis* would seem to require that the statute be understood as an attempt to bring within the scope of the criminal law each class of wrongdoers that contributes to the acts which Congress sought to punish and deter. As the Supreme Court has observed, if Congress had intended to impose a harsher penalty, "the result could have been accomplished with certainty rather than by indirection."[25]

When the intent of Congress in punishing multiple aspects of the same act is ambiguous, it is the practice of the courts to "resolve an ambiguity in favor of lenity."[26] There is a judicial "policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history."[27]

In view of the Supreme Court's recent reaffirmance in *United States* v. *Gaddis* of this functional approach, we believe that the trend of decisions requires a departure from this Court's prior position, which permitted conviction for both theft and possession even though the possession stemmed from the same act as the theft.[28]

Accordingly, we hold that it was improper, under the facts here, to convict Sclafani of both theft from interstate shipment and receipt and possession of that very same property.

B. Relief.

Sclafani urges that if he may not be convicted of both the theft and possession of the same stolen merchandise, his con-

[25] *Prince*, 352 U.S. at 328.

[26] *Heflin*, 358 U.S. at 419.

[27] 352 U.S. at 329.

[28] *See United States* v. *Jackson*, 422 F.2d 975, 978 (6th Cir. 1970); *Carroll* v. *United States*, 174 F.2d 412, 413-15 (6th Cir. 1949), *cert. denied*, 338 U.S. 874 (1949).

victions on *both* counts must be reversed. At a new trial, he urges, the jury should be instructed that the two crimes bear a disjunctive relationship to each other, and that a party such as Sclafani may be convicted of only one crime or the other, but not both. This case does not call for such relief, however.

In *United States* v. *Gaddis*, the Supreme Court held that where there is insufficient evidence to convict the robber of possession, because the possession offense applies to those who have received the proceeds "from the robber" and not to the robber himself, the trial court should dismiss the possession count against the robber. The failure of the trial court to dismiss the charge can be fully corrected on appeal by "the simple expedient of vacating the convictions and sentences under that count."[29] It is not necessary, the Supreme Court said, to reverse all convictions and to remand for a new trial.

The same reasoning is applicable to Sclafani's convictions. We have held that the receipt and possession provision of section 659 is not directed to the thief, but to those who receive the stolen goods from the thief. Since the receipt and possession paragraph cannot apply to Sclafani, who was one of the thieves, the receipt and possession count against him should have been dismissed. Failing dismissal at the trial, the proper remedy is for the appellate court to vacate the conviction and sentence with respect to that count alone.[30]

There remains one related contention. Sclafani argues that since he could not be convicted of both stealing and possessing the same goods, at least under the facts here, he ought not to have been convicted under the conspiracy count that

[29] 44 U.S.L.W. at 4294.

[30] In some instances, where the proof of theft may be dubious relative to the proof of possession, both theft and possession of the same goods may be charged. In such cases, a jury might reasonably find the defendant not guilty of theft, but guilty of possession. The dismissal of the possession count would, therefore, be inappropriate. Improper cumulation of convictions can be avoided, however, by instructing the jury that it may convict of either theft or possession, but not of both. *See Gaddis*, 44 U.S.L.W. at 4294.

charged the seven defendants with conspiracy (1) to steal, and (2) to receive and possess.

This proposition, however, overlooks the fact that a single conspiracy may have as its object a variety of different crimes.[31] The unlawful agreement itself is the essence of the conspiracy. Here the various parties conspired to obtain, one way or another, a truckload of clothing. Some of the parties stole the goods; some of the parties entered the conspiracy later and received the goods from the thieves. The indictment accurately described the crimes encompassed by the scheme, and Sclafani was properly convicted for his participation in the conspiracy which was necessary for the ultimate disposition of the stolen property.

Therefore, we vacate the judgment with respect to the conviction and sentence of Sclafani for receipt and possession of goods stolen from an interstate shipment. In all other respects, the judgment of the district court is affirmed.

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[31] *Braverman* v. *United States*, 317 U.S. 49 (1942); *United States* v. *Mayes*, 512 F.2d 637 (6th Cir. 1975), *cert. denied*, 422 U.S. 1008 (1975); *United States* v. *Goble*, 512 F.2d 458 (6th Cir. 1975), *cert. denied*, 423 U.S. 914 (1975).

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No. 76-72

In the Supreme Court of the United States

OCTOBER TERM, 1976

JERRY MICHAEL SOLIMINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-72

JERRY MICHAEL SOLIMINE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner urges that the government failed to disclose the terms of a negotiated guilty plea with a government witness and that an examination of unopened cartons in a warehouse, with the consent of the owner of the warehouse, constituted an unreasonable search. Petitioner also contends, for the first time, that he was improperly convicted of stealing and receiving the same property.

After a jury trial in the United States District Court for the Southern District of Ohio, petitioner and two co-defendants were convicted of conspiracy (Count I), in violation of 18 U.S.C. 371, theft from an

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interstate shipment, and receiving and possessing goods stolen from an interstate shipment (Counts II and III), both in violation of 18 U.S.C. 659 and 2.[1] Petitioner was sentenced to imprisonment for five years on the first count and ten years on the second and third counts, all sentences to be concurrent and subject to the early parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed in an opinion upon which we largely rely (Pet. App.).

The facts are set forth in the opinion of the court of appeals (Pet. App. 2–3). They show that William Skirvin, a driver for Roadway Express, stole a tractor trailer containing Levi Strauss products from the terminal of his employer in Cincinnati, Ohio. Skirvin acted in concert with petitioner, to whom he was indebted, and defendant Sclafani, who was to "fence" the stolen property. Skirvin unloaded the contents of the trailer at a Cincinnati warehouse where petitioner had made storage arrangements.

On the following day, the manager of the warehouse heard a news broadcast about the hijacking of a railway express truck. He called his brother, the owner of the warehouse, and the Federal Bureau of Investigation. Two days later an FBI agent, with the consent of the warehouse owner, inspected but did not open the cartons, which were stored in an open area. The FBI kept the warehouse under surveillance

[1] The court directed a judgment of acquittal for a fourth defendant.

and, after certain of the defendants attempted to remove the cartons, Skirvin was arrested. He agreed to cooperate with the government and pleaded guilty to a misdemeanor offense.

1. The court of appeals correctly rejected (Pet. App. 10) petitioner's contention, reiterated in his petition (Pet. 5–6), that the government concealed the terms of a plea bargain with Skirvin. The court noted that "the jurors were accurately informed that Skirvin had not yet been sentenced and that the government had made no promises to him with respect to sentencing" (Pet. App. 10). Although petitioner complains (Pet. 6) that Skirvin allegedly did not know whether criminal charges remained pending against him after his plea to the misdemeanor charge, he makes no showing that any possible misunderstanding was deliberately induced or in any way influenced Skirvin's testimony. Moreover, as the court of appeals noted (Pet. App. 10), "the district court ruled as a matter of law Skirvin's plea to the misdemeanor charge had terminated the felony charge in question."

2. The court of appeals also held correctly that petitioner's Fourth Amendment rights were not violated when an FBI agent viewed the unopened stolen cartons on the floor of the warehouse with the consent of the warehouse manager, who had full authority over the premises. Under the circumstances, petitioner had no reasonable expectation of privacy or exclusive use of the premises. See *United States* v. *Mat-*

lock, 415 U.S. 164; *United States* v. *Novello*, 519 F. 2d 1078 (C.A. 5); *United States* v. *Piet*, 498 F. 2d 178 (C.A. 7), certiorari denied, 419 U.S. 1069.[2]

3. Petitioner also contends (Pet. 7–8) that he cannot be punished, even by concurrent sentences, for both theft and possession and receipt of stolen goods. This contention was not raised below and, accordingly, would not ordinarily warrant review by this Court. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2. In *United States* v. *Gaddis*, 424 U.S. 544, however, this Court held that a defendant may not properly stand convicted and sentenced under 18 U.S.C. 2113 for both bank robbery and possession of the proceeds of the robbery. The Court ruled that, where the jury convicts on both charges, the district court should impose only a single sentence for the more serious count. We believe the same principle applies in this case. We note that, in recognition of this principle, the court of appeals vacated the possession and receipt conviction of petitioner's co-defendant, who had been charged with identical crimes and given an identical sentence (Pet. App. 3, 10–14).

While the failure of petitioner to raise this issue in the court of appeals, where it was raised by his co-

[2] By contrast, *Chapman* v. *United States*, 365 U.S. 610, and *Stoner* v. *California*, 376 U.S. 483, on which petitioner relies (Pet. 7), involved searches of a private house and a hotel room, respectively, premises which the defendants in those cases arguably could expect were committed to their private use.

defendant, would fully justify this Court in denying the petition for certiorari, the United States does not oppose a grant of the petition for the limited purpose of remanding the case to the district court to vacate the sentence imposed for possession and receipt. In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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